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No. 99-60

In The
Supreme Court of the United States

RAINEY BROTHERS CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

MEMPHIS AND SHELBY COUNTY BOARD OF ADJUSTMENT; AND CITY OF MEMPHIS, TENNESSEE,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

REPLY BRIEF

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INTRODUCTION

The Respondents' Brief filed by the Memphis and Shelby County Board of Adjustment and the City of Memphis evades the Petition's focal point:

- this Court's decision in *Williamson County Reg. Plan. Agency v. Hamilton Bank*, 473 U.S. 172 (1985) promises property owners a federal forum to litigate their 5th Amendment takings cases after they "ripen" those cases through state court litigation; however
- cases like this one from the Sixth Circuit (and others, as discussed in the Petition) refuse to permit federal court litigation, concluding that the process of "ripening" the federal case in state court bars it altogether through the operation of either claim or issue preclusion.[1]
- In other words, Respondents' view of the law renders *Williamson County's* rule self-stultifying; by their lights, a federal case is "ripe" only for dismissal. That result simply makes no sense.

None of the arguments presented by the City and the Board comes to grips with this fundamental defect in takings law, or the conflict that has been created by the Courts of Appeals as they try to blend this Court's *Williamson County* decision with doctrines developed for other contexts. After 15 years of lower

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[1] The problem is particularly acute here, where the state case was dismissed solely on erroneous *procedural* grounds.

court floundering, it is time for this Court to tell the lower federal courts just how the *Williamson County* rule is supposed to operate. Both commentators and courts are in substantial agreement that the "ripening" process envisioned by this Court in 1985 is not working. Instead, it is too often acting as a trap for property owners who seek vindication of their federal constitutional rights. They find themselves shut out of the very courts whose doors were supposedly "throw[n] open" to them by 42 U.S.C. § 1983. (See *Patsy v. Florida Board of Regents*, 457 U.S. 496, 504[1982].) That simply isn't right.

I

WILLIAMSON COUNTY CREATED A SPECIAL CLASS OF PLAINTIFFS (PROPERTY OWNERS) WHO, ALONE AMONG CONSTITUTIONAL CLAIMANTS, ARE REQUIRED TO "RIPEN" FEDERAL COURT CASES IN STATE COURTS. IN THAT LIGHT, STANDARDS OF CLAIM AND ISSUE PRECLUSION MUST BE APPLIED SO THAT THE FEDERAL RIGHT OF ACTION IS ACTUALLY "RIPENED," NOT DESTROYED.

The City/Board arguments, albeit forcefully made, make Rainey Brothers' point. Their mechanical application of ordinary precepts of claim and issue preclusion (or *res judicata* and collateral estoppel) will derail any effort by property owners to comply with this Court's *Williamson County* instructions and seek compensation in state court as a precondition to later litigating federal law issues in federal court. The interplay is obvious, because the underlying facts will almost always be the same. Here, for example, the claims Rainey Brothers made in the Tennessee courts were premised on the same unconstitutional

actions as the federal claims. Only the legal basis for recovery differed. More importantly, when Rainey Brothers presented its case in state court, the facts were not litigated there. Instead, the state courts refused to grant any hearing on the substance and dismissed the case procedurally on erroneous and unconstitutional grounds, all in violation of federal due process rights. Then the Federal District Court said that a motion to dismiss constituted an appropriate time to apply both claim and issue preclusion.

However, if this Court meant what it said in *Williamson County*, a different result must obtain. Otherwise, property owners will become a class of legal pariahs who — unlike any other American plaintiff — can *never* have their *federal* claims adjudicated in a *federal* court. As shown in the Petition (pp. 11-13), this Court carefully chose its language in *Williamson County*, and delivered the clear message that landowners *could* try their federal constitutional claims once they had "ripened" their case by first seeking compensation in state court. (473 U.S. at 185, 186, 194, 195, 197, 200.) That process can only work if this Court instructs lower federal courts that they are required to hear ripe cases on the merits. Instead, the situation below only produces confusion, injustice, and unfairness that leads landowners to conclude that they were duped by *Williamson County*. As two seasoned commentators summarized it:

> "Reliance on the ripeness rationale, unfortunately, suggests to property owners that their complaints will be ripe and heard in the federal courts after their state suits are over." (Roberts, *Fifth Amendment Taking Claims in Federal Court: The State Compensation Requirement and*

Principles of Res Judicata, 24 Urban Lawyer 479, 480 [1992].)

"This unfortunate result has produced an outcry from litigants who incorrectly assumed that compliance with [*Williamson County*] would eventually give them their day in federal court." (Laitos, *Law of Property Rights Protection* § 10.05[A][5], p.10-25[Aspen Publishers 1999].)

The arguments presented here by the City and the Board simply confirm the anomalies that flow from mechanically applying doctrines of preclusion. The law, contrary to the labored City/Board arguments, is equal to the task of solving this problem. This Court (in *England v. Louisiana Medical Examiners*, 375 U.S. 411, 416,-417 [1964]) faced a closely related issue in the context of abstention, and concluded that a compelled trial in state court followed by a certiorari petition is no substitute for a full trial in federal court. As this Court acknowledged, the trial of facts can be the determinative event in the life of a lawsuit, particularly a constitutional lawsuit.

"It is true that, after a post-abstention determination and rejection of his federal claims by the state courts, a litigant could seek direct review in this Court. But such review...is an inadequate substitute for the initial District Court determination...to which the litigant is entitled in the federal courts. This is true as to issues of law; it is *especially true as to the issue of fact.*

> Limiting the litigant to review here would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. *How the facts are found will often dictate the decision of federal claims. It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues.*[2] There is always in litigation a margin of error, representing error in factfinding. Thus, in cases where, but for the application of the abstention doctrine the primary fact determination would have been by the District Court, *a litigant may not be unwillingly deprived of that determination.* The possibility of appellate review by this Court of a state court determination may not be substituted, against a party's wishes, for his *right to litigate his federal claims fully in federal courts.*" (*England*, 375 U.S. at 416-417 [internal quotation marks and citations omitted]; emphasis added.)

Thus, as this Court acknowledged for abstention cases in *England*, it now seems necessary for this Court to acknowledge for the unique class of land use ripeness cases that a trial in state court may be a precondition, but it "may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in federal courts."

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[2] Recent law emphasizes this important point. In federal actions brought under 42 U.S.C. § 1983, such factual determinations may be made by a jury. (*City of Monterey v. Del Monte Dunes*, 119 S.Ct. 1624 [1999].) Thus, the ruling below not only strips landowners of their right to litigate their federal claims in a federal forum but — adding insult to injury — denies them their Seventh Amendment right to a jury trial as well, when they sue under section 1983.

II

THE COURTS OF APPEALS ARE IN CONFLICT AS THEY SEEK TO ENFORCE BOTH *WILLIAMSON COUNTY* AND THE GENERAL RULES OF CLAIM AND ISSUE PRECLUSION. NO AMOUNT OF DENIAL BY THE RESPONDENTS CAN CHANGE THAT FACT.

The City and the Board insist that there is no conflict among the Circuits. In their words, it "simply does not exist." (Br. in Opp., p.6.) Incredibly, where others see conflict, the City and the Board see only "consistent rules" (Br.in Opp., p.6) that strike "a delicate balance" (Br.in Opp., p.9).

Wrong. That isn't an argument; it's a denial of reality.

The City and the Board insist that there is a "consistent" rule that landowners who "reserve" their federal issues can later pursue them in federal court. (Br. in Opp.,pp.6-7) That is a half truth. As shown in the Petition (pp. 13-17), *some* courts have so ruled,[3] while others have held that there is nothing that can be done to preserve such issues.[4]

That is the problem. These two lines of federal authority cannot coexist. Either there is a way to "ripen" federal issues by first litigating state issues in state court, or there is not. And if the federal issues are to be preserved for federal court litigation, then there must be a way to make that litigation meaningful, by

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[3] *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299 (11th Cir. 1992); *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998); *Jennings v. Caddo Parish School Bd.*, 531 F.d 1331 (5th Cir. 1976).

[4] In addition to the case at bench, see *Wilkinson v. Pitkin County Bd. of Comm'rs*, 142 F.3d 1319, 1325 (10th Cir. 1998); *Palomar Mobilehome Park Assn. v. City of San Marcos*, 989 F.2d 362, 364-365 (9th Cir. 1993); *Peduto v. City of North Wildwood*, 878 F.2d 725,726-728 (3d Cir. 1989).

then there must be a way to make that litigation meaningful, by permitting the plaintiffs to fully and meaningfully litigate those claims, without running into the brick wall of either claim or issue preclusion.

Whether a formal "reservation" is a proper way to resolve the problem is a question that needs to be addressed in the context of a consideration of the merits of this case. The point of discussing the reservation line of cases is to note the way that lower courts are struggling to come to terms with the *Williamson County/res judicata* shuffle by which legitimate federal claims are otherwise barred from litigation. Particularly when compared to the cases holding that state court litigation is *always* preclusive, the cases show the need for this Court's intervention. The "delicate balance" envisioned by the City and the Board (Br. in Opp., p.9) is no more than a shell game in which landowners' constitutional claims are hustled out the door.

III

IT IS OUTRAGEOUS FOR THE RESPONDENTS TO STAND BEFORE THIS COURT, HAVING ACKNOWLEDGED THEIR OWN UNCONSTITUTIONAL COMPLICITY IN ACHIEVING AN ERROR-RIDDLED VICTORY IN THE TENNESSEE COURTS, AND CLAIM THAT RAINEY BROTHERS HAS NO RIGHT TO COMPLAIN.

When reading The City/Board criticism of Rainey Brothers' conduct of the state court litigation, the real facts must be borne in the mind.

First, as the District Court found, the City and the Board confessed their unconstitutional treatment of Rainey Brothers as the state court trial was about to begin:

> "On the first day of the trial [in state court], the City Attorney, representing the City and the

> Board, stipulated in open court that the Board and the City had acted arbitrarily, capriciously, and illegally...[and][i]n essence, defendants stipulated that they had violated plaintiff's rights under both the Tennessee and the United States Constitutions." (App. B, p.8.)

Second, in their Sixth Circuit brief, the City and the Board confessed that they had led the Tennessee courts into error when they refused to award Rainey Brothers any compensation for those conceded constitutional violations. In their own words, "the state court *incorrectly* held that no monetary award would be granted because Tenn. Code Ann. § 29-20-205 precluded such an award...." (Final Br. of Appellees, p.30; emphasis added.) This is exactly why the case was ripe for federal court decision and is exactly what *Williamson County* contemplated - a failure by a state court to award compensation for an admitted unconstitutional taking.

Third, in their Sixth Circuit brief, the City and the Board also confessed that they led the Tennessee courts into error on the interlocutory appeal that struck constitutional claims from Rainey Brothers' complaint. To use their word, the Tennessee courts had "misinterpreted" Tennessee law when they so ruled. (Final Br.of Appellees, p.22.)

Thus, through their own arguments to the state courts, that "incorrectly" "misinterpreted" Tennessee law, the City and the Board used their governmental influence to achieve an unjust result in state court that even they felt the need to confess (albeit at a time they thought they were immune from the consequences of confession). For some reason, the City and the Board nonetheless argue that Rainey Brothers has not shown "that the state court mistakes amounted to an unconstitutional denial of a full and fair hearing." (Br. in Opp., p.5.) They overlook their

own recitation of the facts two pages earlier. There, they concede that "the state court mistakes" resulted in an interlocutory appeal in which the Tennessee courts refused to "relate back" Rainey Brothers' proposed amendments to their complaints, thus striking constitutional claims from their complaints, and wrongly precluding state court litigation of those issues. (Br.in Opp., p.3.) That interlocutory appeal tainted the entire proceeding because it stripped Rainey Brothers of the right to have its constitutional rights enforced. Regardless of what Rainey Brother may have done or not done after the eventual decision on the merits, the Tennessee courts had already decided not to listen to their constitutional claims, and that decision was final.[5]

And now, the City and the Board want this Court to put the final seal of approval on their tactics. Shame on them. This Court should have no part of such an argument. Plainly, Rainey Brothers had no "full and fair opportunity" to litigate its case in the Tennessee courts. As this Court has repeatedly held, such unfair results are not entitled to the "full faith and credit" of legitimate litigation. (*Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 480 [1982]; *Allen v. McCurry*, 449 U.S. 90, 95 [1980]; *Montana v. United States*, 440 U.S. 147, 153 [1979].)

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[5] The City/Board's attempt to squeeze some advantage from Rainey Brothers' litigational delay (Br. in Opp., p.12) is similarly disingenuous. Lost in their argument is the severe economic duress in which Rainey Brothers was placed by the illegal and invalid actions of the City and the Board. Please recall that Rainey Brothers' project was in mid-construction when the City and the Board unceremoniously and unconstitutionally pulled the rug out from under it. Note also that at no time did the City and the Board seek to dismiss the complaints or claim prejudice from any such delay. Nor did any of the Tennessee courts so much as mention the subject. The City/Board discussion is merely a red herring designed to deflect attention from their own constitutional defalcations.

CONCLUSION

The law of ripeness and *res judicata* in Fifth Amendment land use cases is chaotic. There is conflict and confusion in the lower courts. Commentators are nearly unanimous in their criticism of that confusion. Fifteen years after *Williamson County*, it is time for this Court to take stock and clarify what it intended to accomplish in formulating the Fifth Amendment ripeness rule.

Rainey Brothers prays that certiorari be granted.

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